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NO. 88-1675

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

JUDITH MORAN,

Petitioner,

vs.

CHARLES F. PERRY, et al.,

Respondents.

RESPONSE TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

William H. Block
TOUSLEY BRAIN
Suite 1700
720 Olive Way
Seattle, WA 98101
Attorneys for
Respondents
(206) 624-5299

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INTRODUCTION

The Petition in this case seeks review of a decision that is not a final judgment as required by 28 U.S.C. § 1257. The alleged federal question was not raised below. For these fundamental reasons, the Petition for Certiorari should be denied.

RESTATEMENT OF FACTS

Petitioner, Judith Moran ("Moran"), applied for the position of manager of the retirement department in the accounting firm of Perry, Whittemore and Tanner ("PWT"). She was told that a condition of employment would be her agreement to a covenant forbidding her, if she left, from servicing PWT clients who had been clients of the firm while she was there. In all other respects, she was free to compete. If she violated the covenant, by its terms she

would have to pay for the practice she took. After consulting with her attorney, she signed the agreement. See Perry v. Moran, 109 Wn.2d 691, 692-93, 748 P.2d 224 (1987) ("Perry I"), Petn. 5a-10a; Findings of Fact, Petn. 72a.

She stayed with PWT one year, long enough to get to know the clients and client contacts, and no longer. Then she left. Within months of her leaving, she had obtained the business of 85 clients whom she knew by memory alone to have been PWT clients while she was there. She refused, however, either to pay the liquidated damages due under her employment agreement or to stop serving those clients. Perry I, supra, 109 Wn.2d at 694-95, Petn. 10a-11a.

PWT filed suit in Superior Court to enjoin Moran from serving PWT clients or, in the alternative, to col-

lect on the liquidated damages provision of the covenant not to compete. The only significant issue in discovery, and the focus of the trial, was the enforceability of the covenant not to compete.

At the close of PWT's case, the trial judge dismissed the case. An appeal was certified by the Washington Court of Appeals directly to the Washington Supreme Court. The Washington Supreme Court reversed, and remanded with directions to enter judgment for PWT. Perry I, supra.

At that point Moran filed a Motion for Reconsideration. The Motion for Reconsideration ran for fifteen pages and cited eight Washington cases and no federal cases. It cited neither any federal statute nor any federal constitutional provision. For the Court's convenience, a copy of the Motion for

Reconsideration has been lodged with the Clerk of this Court.

The Motion for Reconsideration argued in Part I that the Washington State Supreme Court had erroneously ruled on the issue of liquidated damages, and that the reasonableness of those liquidated damages should be remanded to the trial court. It argued in Section II that the imposition of liquidated damages under the facts of the case would constitute a penalty. It argued in Section III, at length, that the enforceability of liquidated damages was a question of fact that should be reserved to the trial court. It also argued in Part III, in three sentences, without citation to any law, state or federal, as follows (this language being the basis for the petition for certiorari):

> The fourth affirmative defense raised by the defendant dealt with the breach of the employment agreement by the plaintiff and the failure of the plaintiff to comply with the express and implied conditions of that agreement. The plaintiff, having substantially and materially breached the agreement, is not in a position to complain of breach by the defendant.
>
> As to the issue of substantial breach by the plaintiff, the defendant has not even been provided an opportunity to provide a memorandum of authorities, let alone to present factual evidence.

Motion for Reconsideration at 5.

Part IV of the Motion for Reconsideration argued that the change in the law relating to employment contracts and covenants not to compete was not justified. This Part was the main focus of the Motion for Reconsideration.

Upon reconsideration, the Washington State Supreme Court reaffirmed its

earlier decision, but remanded for a trial on whether the amount of liquidated damages in this case was appropriate. Perry v. Moran, 111 Wn.2d 885, ___ P.2d ___ (1989) ("Perry II"). The majority opinion contains no discussion of any constitutional issue, state or federal. Id., 111 Wn.2d at 886-88, Petn. 56a-59a. The dissent on reconsideration argued at length that under state law and policy there should have been a trial on the reasonableness of the covenant not to compete. Id., 111 Wn.2d at 888-92, Petn. 59a-69a. The dissent also argued, citing only Washington cases, that with respect to the allegation of an undisposed of affirmative defense, "the majority's action is contrary to our established law and procedures." Id., 111 Wn.2d at 889, Petn. 61a-62a. The dissent mentioned, but did not otherwise discuss, U.S.

Constitution Amendment XIV. Id., 111 Wn.2d at 888, Petn. 60a.

ARGUMENT

This is the classic situation where a case has been tried at length in the state courts on one particular issue, and, after the case has been lost in the state courts, a skillful new appellate attorney, brought in at the last minute, seeks to create a federal constitutional issue where none was ever contemplated or decided.

The case, however, fails to meet either of the fundamental requirements of 28 U.S.C. § 1257 that there be (i) a final judgment of the highest state court and (ii) that such final judgment decides a substantial federal question that was properly raised in the state court proceedings.

I. THERE IS NO FINAL JUDGMENT

The decision below concludes:

> The cause is remanded to the trial court for further proceedings to establish whether the sum set by the liquidated damages provision is reasonable and, if not, what sum is justified.

Perry II, supra, 111 Wn.2d at 887, Petn. at 59a.

28 U.S.C. § 1257(a) contains a jurisdictional requirement that certiorari may be sought only from "final judgments or decrees rendered by the highest court of the state in which a decision could be had. . . "

A case remanding for trial on damages is not a final judgment under 28 U.S.C. § 1257. As this Court explained in Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 68, 92 L.Ed. 1212, 68 S.Ct. 947 (1948):

> [T]he requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up -- for example where liability has been determined and all that needs to be adjudicated is the amount of damages.

See also e.g. Bruce v. Tobin, 245 U.S. 18, 19, 62 L.Ed. 123, 23 S.Ct. 7 (1917); Martinez v. International Banking Corp., 220 U.S. 214, 223-24, 55 L.Ed. 438, 31 S.Ct. 408 (1911).

As the Court in Republic Natural Gas, supra, continued:

> Merely because a party to a litigation may be temporarily out of pocket, is not sufficient to warrant immediate review of an incomplete State judgment. Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction. Memphis Natural Gas v. Beeler, 315 U.S. 649, 651. The policy against premature constitutional adjudications demands that any doubts in

> maintaining this burden be resolved against jurisdiction. See citation of cases in the concurring opinion of Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 345, 348.

Republic Natural Gas, supra, 334 U.S. at 70-71.

In this case, even if a federal question had been presented, which it was not, there is no final judgment and the petition for certiorari must be denied.

II. THERE WAS NO FEDERAL QUESTION PRESENTED BELOW

As noted on pp. 4-5, supra, the entire alleged presentation of the federal question sought to be reviewed here was contained in three sentences in a motion for reconsideration, which contained no citation to any federal statute or federal constitutional provision. The most that Petitioner can argue is that

the heading for Part III of the Motion for Reconsideration (mirrored in the Motion's introductory listing of headings) read: "To Prevent Defendant from Presenting Evidence or Proof of Affirmative Defenses Deprives the Respondent of Due Process of Law."

This Court has long held, however, that a mere reference to "due process of law" without any citation to the federal constitution or federal case law is conclusively deemed to be an argument directed to rights afforded by the state constitution. For example, in Bowe v. Scott, 233 U.S. 658, 58 L.Ed. 1141, 34 S.Ct. 769 (1914), the Court considered whether a federal question was presented in an argument to the state court reading as follows: "That the ordinance is an attempt to take from your complainants whose property adjoins and abuts the said

alley their rights in and to said alley without due process of law." The Court held unequivocally that this argument did not raise a federal question. The Court stated:

> But it is settled that such an averment making no reference to the Constitution of the United States and asserting no express rights thereunder is solely referrable to the state constitution, which in this instance has a due process clause, and affords no basis whatever for invoking the jurisdiction of this Court.

Bowe, supra, 233 U.S. at 664-65, citing Harding v. Illinois, 196 U.S. 78, 49 L.Ed. 394, 25 S.Ct. 176 (1904) Miller v. Cornwall R.R. Co., 168 U.S. 131, 134, 42 L.Ed. 409, 18 S.Ct. 34 (1897). Here too, there is a state due process clause, Wash. Const. Art. III, § 3, and non-specific "due process" references in the Motion for Reconsideration must be

deemed to refer to that state constitutional provision.

CONCLUSION

Petitioner's failure to raise her alleged inability to present affirmative defenses reflects the true issues in the case. The case was tried and was argued on the validity of the covenant not to compete. The evidence that petitioner sought to have considered by the trial court on remand was evidence going to the reasonableness of the covenant not to compete, which evidence the Washington State Supreme Court held was irrelevant as a matter of state law. The petition presents an interesting attempt by new appellate counsel to obtain review where none is justified, but nothing more.

For the reasons stated above, the Petition for Certiorari should be denied.

RESPECTFULLY SUBMITTED this 2nd day of June, 1989.

William H. Block
TOUSLEY BRAIN
Suite 1700
720 Olive Way
Seattle, WA 98101
Attorneys for
Respondents
(206) 624-5299

6081f